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No. 99-646

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

SHANNON ROGAN,

Petitioner,

v.

PAUL F. EVANS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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1488

QUESTION PRESENTED FOR REVIEW

Whether the First Circuit Court of Appeals properly affirmed the dismissal of Respondent, Paul Evans, in his individual capacity, when Petitioner failed to plead facts sufficient to support an inference that Respondent had notice of or directly participated in an alleged conspiracy between the Boston Police Department and the MBTA police.

LIST OF PARTIES

The Respondent, Paul Evans, does not concede responsibility for a policy providing for the automatic transfer of jurisdiction when an accident occurs on public ways.

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OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported at 175 F.3d 75 (1st Cir. 1999). The Opinion of the United States District Court for the District of Massachusetts is unreported. Both decisions are reproduced in the Appendices to the Petition (A-la-11a, A-16a-18a), respectively.

BASIS OF JURISDICTION

The Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1254. Respondent is satisfied with this statement of jurisdiction insofar as it challenges dismissal of Evans in his individual capacity.

STATEMENT OF CASE

Respondent is not satisfied with the Statement of the Case presented in the Petition as it contains misstatements of the record below, and her own conclusions of law. Respondent submits the following Statement of the Case, taken from the opinion issued by the First Circuit Court of Appeals ("First Circuit"):

On March 15, 1996, a motor vehicle being operated by Petitioner Shannon Rogan collided with a trolley car operated by the Massachusetts Bay Transportation Authority ("MBTA"). The MBTA has its own police force, and shares jurisdiction with the BPD over certain matters. Officers from both the MBTA and the Boston Police Department ("BPD") responded to the accident scene. Pursuant to departmental policy, the BPD officers that initially responded to Petitioner's motor vehicle accident turned over control of the investigation of the accident to the MBTA officers. *Rogan* v. *Menino*, 175 F.3d 75, 76 (1st Cir. 1999).

Petitioner sued Respondent Paul Evans in the United States District Court for the District of Massachusetts ("District Court"). Invoking 42 U.S.C. § 1983, Rogan alleged that Respondent Evans, jointly and severally with the other Boston defendants, hindered her access to the courts by turning over control of the accident investigation, thereby

conspiring with the MBTA in an attempt to cover up the negligence of the MBTA trolley driver. *Rogan* v. *Menino*, 175 F.3d at 77-78.

The District Court dismissed all claims against Respondent in his individual capacity on respondent's motion to dismiss. (A-16a-18a). Respondent was then dismissed in his official capacity at final pretrial conference, and summary judgment entered in favor of Respondent Evans. *Id.* The First Circuit found that the District Court properly dismissed the claims against Evans in his individual capacity, and affirmed that portion of the District Court's decision. *Rogan* v. *Menino*, 175 F.3d at 81. The remainder of the judgment was remanded for further proceedings in the District Court. *Id.*

REASONS FOR DENYING THE WRIT

Pursuant to Supreme Court Rule 10 "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion . . . A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." In this case, the Respondent improperly states the proceedings and holdings below, and asks this Court to find error in both the District Court and First Circuit's dismissal of Respondent Evans in his individual capacity, when to do so was proper. The District Court and the First Circuit Court of Appeals properly concluded that Respondent Evans should be dismissed in his individual capacity.

Both the District Court and the First Circuit properly reviewed Petitioner's claims against Respondent Evans when ruling on Respondent's motion to dismiss. The First Circuit accepted Petitioner's well-pleaded facts as true, and drew all reasonable inferences in Petitioner's favor. *Rogan* v. *Menino*, 175 F.3d 75, 77 (1st Cir. 1999); *Aulson* v. *Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). Stating that liability in an individual capacity under section 1983 "must be gauged in terms of [his] own actions", Respondent Evans was dismissed. *Rogan v. Menino*, 175 F.3d at 77. Both the District Court's and the First Circuit's dismissal of Evans was proper, based on properly stated rules of law.

The Petitioner's bold, unsubstantiated argument that the First Circuit, and by inference the District Court, "invented a theory of liability" is in no way justified by the record, and is simply incorrect. In a well-reasoned, thorough decision, the First Circuit analyzed the dismissal of Respondent Evans *de novo,* and arrived at the same result as the District Court. *See Salve Regina College* v. *Russell*, 499 U.S. 225 (1991). Petitioner failed to state a claim of deliberate indifference against Evans, individually. Petitioner also failed to allege that Evans directly participated in the actions that allegedly violated her rights. Therefore, whichever theory of liability that Petitioner chooses, she has failed in all regards, as both lower courts have found, and she cannot now look to this Court to support her unsubstantiated, unplead theories against Respondent, Paul Evans.

I. THE LOWER COURTS PROPERLY FOUND THAT THE PETITIONER FAILED TO PLEAD FACTS SUFFICIENT TO SUPPORT AN INFERENCE THAT RESPONDENT PAUL EVANS HAD NOTICE OF OR DIRECTLY PARTICIPATED IN AN ALLEGED CONSPIRACY BETWEEN THE BOSTON POLICE DEPARTMENT AND THE MBTA.

Both the District Court and the First Circuit Court of Appeals properly reviewed Petitioner's allegations against Respondent, Paul Evans, and properly dismissed Respondent Evans in his individual capacity. The First Circuit accepted all of Petitioner's well-pleaded facts as true, and drew all reasonable inferences in Petitioner's favor. *Rogan* v. *Menino*, 175 F.3d 75, 77 (1st Cir. 1999); *Aulson* v. *Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). Dismissal was affirmed by the First Circuit after accepting all well-pleaded facts, drawing reasonable inferences, and concluding that the factual allegations in Petitioner's Complaint did not justify recovery on Petitioner's conspiracy theory. *Rogan* v. *Menino*, 175 F.3d at 77; *see also Leatherman* v. *Tarrant County N.I.&C. Unit*, 507 U.S. 163, 164 (1993). Properly stating that "liability of persons sued in their individual capacities under section 1983 must be gauged in terms of their own actions," *Rogan* v. *Menino*, 175 F.3d at 77; *see also Kentucky* v. *Graham*, 473 U.S. 159 (1985), the First Circuit and the District Court dismissed Respondent in his individual capacity, concluding that Petitioner's complaint "utterly failed to link [Evans] to the alleged conspiracy to deprive Rogan of meaningful access to the courts." *Id. See also Barreto-Rivera* v. *Medina-Vargas*, 168 F.3d 42 (1st Cir. 1999) (to recover against a supervisor under § 1983, a plaintiff must show that there is an affirmative link between the street-level misconduct and the

action, or inaction, of supervisory officials). The First Circuit did so only after properly construing Petitioner's complaint in the light most favorable to her, and found that, at most, the complaint predicated liability "on the theory that BPD personnel collogued with MBTA personnel to conceal the negligence of the trolley car driver, thus inhibiting Rogan's right to sue the MBTA for damages." *Rogan* v. *Menino*, 175 F.3d at 78. Even with such a finding, the First Circuit properly concluded that Petitioner did not allege, or even insinuate, that Evans directly participated in the actions that allegedly violated Petitioner's constitutional rights. *Id.*

Yet, even construing the Petitioner's complaint in this charitable and liberal fashion, the First Circuit concluded, properly, that without stating or pleading some direct involvement by Respondent Evans, Petitioner was then required to state a claim of supervisory liability against Evans to keep her allegations against Respondent in his individual capacity alive. To do so, Petitioner needed to "depict a scenario that would permit a fact-based inference that [Evans was] guilty of 'conduct that amounted to the condonation or tacit authorization' of wrongdoing." *Rogan* v. *Menino*, 175 F.3d. 75, 78 (1st Cir. 1999); *see also Camilo-Robles* v. *Zapata*, 175 F.3d 41 (1st Cir. 1999); *Barreto-Rivera* v. *Medina-Vargas*, 168 F.3d 42 (1st Cir. 1999). Petitioner failed to allege any facts from which any court could conclude that Evans knew or had any basis of knowing that MBTA officers were improperly investigating MBTA accidents to shield or decrease MBTA liability. Because Petitioner once again failed to do so, dismissal of Respondent Evans was proper.

As she did in the lower courts, Petitioner concedes that Evans had no notice of a conspiracy between the BPD and the MBTA, but requests now that this Court as well make quantum leaps in logic to infer that because there was a policy of transferring investigations of MBTA trolley-car acci-

dents to the MBTA, then there must have been a conspiracy between the two police forces, and that Respondent Evans must have known that the policy was being followed in an unconstitutional fashion. The First Circuit properly found that there is no prohibition against investigations being conducted by a member of the same agency that he or she is investigating. *Withrow* v. *Larkin*, 421 U.S. 35, 52 (1975). To the contrary, courts have long recognized implicitly that police departments in Massachusetts have established internal affairs divisions for the purpose of conducting such investigations of their own officers. *Cf. Commonwealth* v. *Wanis*, 426 Mass. 639, 690 N.E.2d 407 (1998); *Reinstein* v. *Police Commissioner of Boston*, 378 Mass. 281, 391 N.E.2d 881 (1979). And, the Petitioner has failed to overcome the presumption that government officials are impartial. *Withrow* v. *Larkin*, 421 U.S. 35 (1975).

Further, Respondent Evans is yet another step removed from Petitioner's allegations of impartiality, and the Petitioner's bare and unsupported allegations of some sinister MBTA conspiracy. Although Petitioner alleges that, incredibly, the lower courts "invented a theory of liability" to avoid the implications of *Monell*, such is not the case. Interpreting its earlier decision, this Court stated that *Monell* "provides a fault based analysis for imposing liability." *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 818 (1985). "Where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Id.* at 824.

Assuming Petitioner directs her *Monell* argument against Respondent's official capacity allegations, which are not the basis of this appeal nor raised in her Petition, she has failed once again. The First Circuit properly found that the policy

of transferring investigations to the MBTA was not inherently unconstitutional, stating that the policy "is constitutional on its face — after all, there is no constitutional prohibition against organizational schemes that lodge self-investigative powers within a government agency. . . ." *Rogan* v. *Menino*, 175 F.3d 75, 78 (1st Cir. 1999). Further, Petitioner has presented absolutely no evidence in either the District Court or the First Circuit Court of Appeals of a causal connection between this policy and any alleged constitutional violation. Thus, the dismissal of Respondent Evans in his individual capacity, by both the District Court and the First Circuit Court of Appeals was proper, as Petitioner has failed to establish both an unconstitutional policy and a causal connection between the policy and the alleged constitutional deprivation.

CONCLUSION

For all of the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,
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